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No. 88-23

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

—v.—

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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PETITION FOR CERTIORARI FILED JULY 6, 1988
CERTIORARI GRANTED OCTOBER 11, 1988

QUESTION PRESENTED

Is an order of a United States District Court denying enforcement of a foreign forum selection clause appealable as a collateral final order?

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* The caption of the case in this Court contains the names of all parties. Petitioner does not have any corporate parent, subsidiary, or affiliate.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States

Court of Appeals for the Second Circuit, officially reported at 844 F.2d 50 (2d Cir. 1988), is printed in the Joint Appendix ("JA") at 3. The decision of the United States District Court for the Southern District of New York dictated in open court on October 21, 1987 and entered on October 23, 1987, not officially reported, is printed at JA, 17.

JURISDICTIONAL STATEMENT

The order below sought to be reviewed is dated April 7, 1988. It was entered April 7, 1988.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATEMENT OF THE CASE

Petitioner Lauro Lines s.r.l.

("Lauro Lines") is the successor to Achille Lauro ed Altri Gestione m/n "Achille Lauro" s.n.c. ("ALA") and Societa de Fatto Achille Lauro ed Altri Gestione Armatoriale Navi Noleggiate ("FAL"), partnerships whose offices were located at Via C. Colombo 45, Naples, Italy. ALA owned the Italian-flag ACHILLE LAURO. Since February, 1982 both partnerships were in Italian reorganization proceedings. On July 28, 1986 all members of the Lauro group, including these partnerships, were merged into one company, i.e., Lauro Lines s.r.l. The merger was deemed retroactive to February, 1982.

On September 14, 1984 ALA time chartered the ACHILLE LAURO to a joint venture composed of FAL and Chandris S.A. (Piraeus). The joint venture operated the Vessel as a cruise ship. Tickets

were sold to passengers in all parts of the world. Chandris S.A. (Piraeus) was responsible for the United States market. It retained Chandris, Inc. in New York to distribute tickets to interested travel agents and others.

In October, 1985 the ACHILLE LAURO was hijacked by terrorists while on a cruise in the Mediterranean. The cruise commenced at Genoa, Italy, and it was scheduled to terminate at that port. The ticket held by each passenger contained the following provision (the "Forum Clause"):

> Art. 31 -- VENUE OF JUDICIAL PROCEEDINGS -All controversies that may arise directly or indirectly in connection with or in relation to this passage contract, must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived . . . .

Beginning in November, 1985 certain American passengers, and the representa-

tive of a deceased passenger, brought a series of suits in the United States District Court for the Southern District of New York against Lauro Lines, Chandris, and Crown Travel Service, Inc. ("Crown"). Jurisdiction was based upon diversity of citizenship, 28 U.S.C. § 1332, and the actions were also within the District Court's admiralty jurisdiction. 28 U.S.C. § 1333.*

On November 17, 1986 Lauro Lines filed a motion for an order dismissing all actions against it on the grounds of

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* Specifically, the bases for jurisdiction were as follows: the Chasser action (85 Civ. 9708) (diversity of citizenship); the Klinghoffer action (85 Civ. 9303) (diversity of citizenship and the Death on the High Seas Act, 28 U.S.C. § 761 et seq.); the Saire action (86 Civ. 6332) (diversity of citizenship); the Meskin action (86 Civ. 4657) (no jurisdictional allegation in the complaint).

lack of New York in personam jurisdiction, the Forum Clause, and forum non conveniens. Defendants Chandris and Crown joined the motion to dismiss on the basis of the Forum Clause. Plaintiffs in all actions opposed the motion.

On October 21, 1987, following oral argument, the District Court denied Lauro Lines' motion. With respect to the Forum Clause, the District Court stated, in part:

> Under the cases the touchstone is whether the ticket reasonably communicates the importance of its contract provisions. In this case, that is a close question.
>
> It is one upon which reasonable jurists, lawyers, and laymen might differ.

JA, 19.

On October 23, 1987 the Order denying enforcement of the Forum Clause was entered by the District Court.

On November 20, 1987 Lauro Lines filed its Notice of Appeal to the United States Court of Appeals for the Second Circuit from that portion of the Order denying enforcement of the Forum Clause. Appellate jurisdiction was invoked under the collateral final order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Chandris and Crown filed similar Notices of Appeal. All cases were consolidated for purposes of the appeal.

On January 29, 1988 the passengers filed a motion to dismiss the appeal for want of appellate jurisdiction.

On April 7, 1988 the United States Court of Appeals for the Second Circuit granted the motion for an order dismissing the appeal for lack of appellate jurisdiction, holding orders denying enforcement

of foreign forum selection clauses are not immediately appealable as collaterally final orders "because we believe the refusal to dismiss on forum-selection grounds is not 'effectively unreviewable on appeal from a final judgment.'" Chasser v. Achille Lauro Lines, 844 F.2d 50, 53 (2d Cir. 1988).

> We reject Lauro's suggestion that the right granted in a forum-selection clause, if enforceable, must be vindicated immediately or it is lost. It is a right to have the binding adjudication of claims occur in a certain forum; it is not a right of the same magnitude as a constitutional right to be free from double jeopardy, see Abney v. United States, 431 U.S. at 660-62 . . . or the right to be free of any trial whatever, see Mitchell v. Forsyth, 472 U.S. at 530 . . . (qualified governmental immunity); Helstoski v. Meanor, 442 U.S. at 506-08 . . . (Speech and Debate immunity). The rights to escape any trial or any further trial are rights that would be lost unless vindicated at a pretrial stage. In contrast, the right to secure adjudication in a particular forum is not

> lost simply because enforcement is postponed. And, as noted above, the fact that postponing review may entail additional litigation expense has been explicitly rejected by the Supreme Court as a basis for immediate appeal.

844 F.2d at 55.

SUMMARY OF ARGUMENT

There is a strong federal policy limiting appeals to those "final decisions" of the United States District Courts that terminate the action. Gulfstream Aerospace Corp. v. Mayacamus Corp., 485 U.S. ____, 108 S.Ct. 1133, 99 L.Ed.2d 296, 304 (1988).

However, this Court has long recognized that there are district court orders which "fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

The Order of the United States District Court for the Southern District of New York denying enforcement of the Forum Clause falls into this small class of collateral orders qualifying for immediate appellate review. The Order "conclusively determine[s] the disputed question"; it "resolve[s] an important issue completely separate from the merits of the action"; and, it is "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 11-12 (1983).

There is a strong federal policy favoring enforcement of forum selection clauses. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). To parties bound by contract, the forum clause is often "a

vital part of [their] agreement," especially when parties of diverse nationality are involved. 407 U.S. at 14. Its very purpose is to restrict litigation to the agreed forum, before the chosen tribunal, and to free the contracting parties from exposure to being haled for trial before any other tribunal.

Orders denying enforcement of forum clauses simply cannot be effectively reviewed after judgment. By then the trial on the merits has already been had. Sterling Forest Associates, Ltd. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988); Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850-51 (8th Cir. 1986); Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 196-97 (3rd Cir. 1983) cert. denied 464 U.S. 938

(1983); see also Abney v. United States, 431 U.S. 651 (1977); Helstoski v. Meanor, 442 U.S. 500 (1979).

Furthermore, as demonstrated by Hodes v. S.N.C. Achille Lauro, Nos. 88-5086, 88-5092, slip op. (3d Cir. September 22, 1988),* immediate appellate review of orders denying enforcement of forum clauses serves to spare the courts, and the parties, needless time and expense in what otherwise might be a vain act, namely trial before a tribunal barred by the clause.

It was recently stated in Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. ____, 108 S. Ct. 2239, 101 L.3d.2d 22 (1988):

*Hodes is reproduced as an Appendix to Lauro Lines' Reply Brief in Support of Petition for a Writ of Certiorari dated October 4, 1988.

> [E]nforcement of valid forum selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system. . . .
>
> The federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time consuming pre-trial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses. . . .

101 L.Ed.2d at 33-34 (Kennedy, J., concurring).

There can be no more efficacious procedural safeguard for the encouragement of the use of forum clauses than immediate appellate review of district court orders refusing to enforce them. See Sterling Forest Associates, Ltd. v. Barnett-Range Corp., 840 F.2d 249 (4th Cir. 1988) (district court required to follow Bremen "despite any individual predilections it may have had.").

ARGUMENT

AN ORDER OF A UNITED STATES DISTRICT COURT DENYING ENFORCEMENT OF A FOREIGN FORUM SELECTION CLAUSE IS A COLLATERAL FINAL ORDER IMMEDIATELY APPEALABLE UNDER 28 U.S.C. § 1291

A. The Cohen Test

Generally, appeals are restricted to "final decisions of the district courts." 28 U.S.C. § 1291. However, § 1291 does not restrict appellate jurisdiction to only "those final judgments which terminate an action." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545 (1949). The exceptions permitted by 28 U.S.C. § 1292 for certain interlocutory orders, decrees and judgments, indicate a Congressional intention "to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties." Id.

In Cohen, the Court held immediately appealable an order denying a corporate defendant in a diversity action the benefit of a statute of the forum state requiring plaintiffs in stockholder derivative suits to post security for expenses. It did so "because [the order] is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U.S. at 546-47. The Court explained:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

337 U.S. at 546. See also Swift & Co.

Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684, 689 (1950) (finality not to "be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process"); Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964) (competing considerations are "inconvenience and costs or piecemeal review on the one hand and the danger of denying justice by delay on the other").

This Court has refined Cohen to establish a three-pronged test for determining whether an order which does not finally end the litigation is immediately appealable. See Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). First, the order must "conclusively determine the disputed question;" second, it must

"resolve an important issue completely separate from the merits of the action"; and third, it must "be effectively unreviewable from a final judgment." 437 U.S. at 468. An order satisfying these requirements qualifies as a collateral final order immediately appealable under § 1291. See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 11-12 (1983).

B. Orders Denying Pretrial Motions to Dismiss Qualify for Immediate Appellate Review When the Very Authority of the Tribunal to Try the Defendant is Brought into Question.

In Abney v. United States, 431 U.S. 651 (1977), the Court held that an order denying a motion to dismiss an indictment on double jeopardy grounds satisfied the three-pronged Cohen test:

> Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the "small class of cases" that Cohen has placed beyond the confines of the final judgment rule.

431 U.S. at 659.

First, the order conclusively determined the disputed question:

> [T]here can be no doubt that such orders constitute a complete, formal and, in the trial court, a final rejection of the criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee. Hence, Cohen's threshold of a fully consummated decision is satisfied.

431 U.S. at 659.

Second, the order resolved an important issue completely separate from the merits of the action:

> [T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's

impending criminal trial, i.e. whether or not the accused is guilty as charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. . . . Rather, he is contesting the very authority of the Government to hale him into Court to face trial on the charge against him. . . . Thus, the matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself in the sense that they will not "affect, or . . . be affected by, decision of the merits of this case." . . .

431 U.S. at 659-60.

Third, the order was effectively unreviewable on appeal from a final judgment:

> Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same

crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments.

It is a guarantee against being twice put to <u>trial</u> for the same offense. . . .

Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. . . . Obviously, these aspects of the guarantee's protection would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid <u>exposure</u> to double jeopardy and thereby enjoy the full protection of the Clause,

> his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

431 U.S. at 460-62 (emphasis in original). See also, Helstoski v. Meanor, 442 U.S. 500, 508 (1979) (denial of motion for an order dismissing an indictment on the ground it violated the Speech or Debate Clause was subject to immediate appeal as a collateral final order); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) ("[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.").

The collateral order exception of Cohen "is equally applicable in both civil and criminal proceedings." Abney

v. United States, 431 U.S. 651, 659 n.4. (1977). Indeed, Cohen, Swift, Gillespie and Moses H. Cone were all civil proceedings.

Moreover, in the civil context, state court decisions rejecting a party's federal law claim that it is not subject to suit before a particular tribunal are "final" for purposes of certiorari jurisdiction under 28 U.S.C. § 1257.

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 USC § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until

> the conclusion of the proceedings.

Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963). See also Local No. 438 Construction & General Laborers Union v. Curry, 371 U.S. 542, 549 (1963) ("The jurisdictional determination here is as final and reviewable as was the District Court's decision in [Cohen], exempting plaintiffs in a stockholder's suit filed in a federal court from filing a bond pursuant to a state statute.").

C. An Order Denying Enforcement of a Forum Clause Meets the Cohen Test for Immediate Appellate Review

In The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), this Court stressed the importance of forum clauses to the civil litigant:

> The expansion of American business and industry will hardly be encouraged

> if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

407 U.S. at 9.

When Americans venture abroad:

> Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter.

407 U.S. at 11-12.

The towage agreement in Bremen was between citizens of different countries; its performance involved "the waters of many jurisdictions;" and the tow could sustain damage "at any point along the route, and there were countless possible ports of refuge." 407 U.S. at 13. The importance of the forum clause was

obvious:

> Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.

407 U.S. at 13-14.

Thus, "in the light of present-day commercial realities and expanding international trade, we conclude the forum clause should control absent a strong showing that it should be set aside." 407 U.S. at 15. So strong is the policy

favoring enforcement that absent a strong countervailing public policy consideration, undue influence, or fraud, the burden is on the party seeking to avoid a forum clause to establish it "would be effectively deprived of its day in court should it be forced to litigate in [the chosen forum]." 407 U.S. at 18-19.

The forum clause here was part of a ticket contract. Like the clause in the towage agreement in Bremen, "[at] the very least, the clause [is] an effort to eliminate all uncertainty as to the nature, location, and outlook of the forum in which [the parties] of differing nationalities might find themselves." 407 U.S. at 13 n.15.

Forum clauses are especially important to cruise lines. They are placed in ticket contracts to ensure, among other

things, that in the event of an incident giving rise to multiple claims, all suits will be heard in one forum. There will be but one trial on each claim, held at the agreed location, before the chosen tribunal. All proceedings will be governed by a common procedure, and all claims will be judged by a common legal standard.

The order below denying enforcement of the Forum Clause falls squarely within that "small class" of orders placed by Cohen beyond the confines of the final judgment rule.

First, there is nothing "inherently tentative" about the Order -- it was "made with the expectation [it would] be the final word on the subject addressed." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 12 n.14 (1983). The Order constitutes "a com-

plete, formal and, in the trial court, a final rejection" of Lauro Lines' Forum Clause defense. There are simply no further steps that can be taken in the District Court to avoid the trial Lauro Lines maintains is barred by the Forum Clause. Abney v. United States, 431 U.S. 651, 659 (1977). In no sense did the Order leave the matter "open, unfinished or inconclusive." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

Second, the "very nature" of the Forum Clause is that it is collateral to, and separable from, the principal issue at trial, i.e., whether Lauro Lines is liable for the injuries alleged in the complaints. By arguing that the Forum Clause bars suit against it in the United States District Court for the Southern

District of New York, Lauro Lines "makes no challenge whatsoever to the merits of the [claim] against [it]." Abney v. United States, 431 U.S. 651, 659 (1977). Rather, Lauro Lines is contesting the authority of the passengers to hale it for trial before a court sitting in New York. See Abney, supra, 431 U.S. at 659.

Third, the rights conferred by the Forum Clause "would be significantly undermined if appellate review . . . were postponed until after [trial]." Abney, supra, 431 U.S. at 660. The very purpose of the Forum Clause is to ensure a single trial, at the selected forum, before the chosen tribunal to the exclusion of all others. It seeks to protect against exposure to litigation, with its concomitant stress, expense and publicity, before alien fora on claims

arising out of the agreement: "It thus protects interests wholly unrelated to the propriety of any subsequent [judgment]." 431 U.S. at 661. Consequently, if the Forum Clause is to provide an effective shield from exposure to suit in contractually excluded fora, an order denying its enforcement simply "must be reviewable before that . . . exposure occurs." 431 U.S. at 662. See also Helstoski v. Meanor, 442 U.S. 500, 507 (1979).

D. The Decisions of the United States Courts of Appeals on the Question of Immediate Review of District Court Orders Denying Enforcement of Forum Clauses.

Guided by Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), as refined by Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), and by the strong policy favoring

enforcement of forum clauses enunciated in The Bremen, 407 U.S. 1 (1972), the United States Courts of Appeals for the Third, Fourth and Eighth circuits have held an order denying enforcement of a forum clause qualifies for immediate appellate review as a collaterally final order. Coastal Steel v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 195-97 (3rd Cir. 1983), cert. denied 464 U.S. 938 (1983); General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 355-56 (3rd Cir. 1986); In re Diaz Contracting, Inc., 817 F.2d 1047, 1048 (3rd Cir. 1987); Hodes v. S.N.C. Achille Lauro, Nos. 88-5086, 88-5092, slip op. (3rd Cir. September 22, 1988); Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850-51 (8th Cir. 1986); Sterling Forest Associates,

Ltd. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988).

The Second, Fifth, and Seventh circuits have also considered the question. The Second Circuit has unqualifiedly held such an order not subject to immediate appellate review. Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988). The Fifth Circuit, in Louisiana Ice Cream Distributors, Inc. v. Carvel Corp., 821 F.2d 1031 (5th Cir. 1987), held an order denying a motion to dismiss based upon a domestic forum clause was not immediately appealable, but it also noted that there were issues which were "intertwined inextricably with the merits of this litigation." 821 F.2d at 1033. The Seventh Circuit, in Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860

(7th Cir. 1984), cert. denied, 469 U.S. 890 (1984), held that denial of a motion for an order remanding the matter to a state court on the basis of a domestic forum clause was not immediately appealable, but it indicated the holding would be to the contrary if the motion was for an order dismissing the action on the basis of a foreign forum selection clause:

> Denial of a motion to remand to a state court presents a far less exigent set of circumstances than existed in Coastal Steel, where the issue was whether an American court was the appropriate forum for the litigation. Cf. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 . . . (1972), and the Court's discussion of the importance of foreign commerce. In contrast to Coastal Steel, where the applicable law (English or American) would differ depending on the forum in which the case was tried, the controlling law in the instant case, in its present posture, will be the same whether it is tried in the Northern District of Illinois, or the Circuit Court of Cook County.

728 F.2d at 864.

The Second Circuit in Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988) found "the district court's denial of Lauro's motion to dismiss on the basis of the forum selection clause in the passenger's ticket will be effectively reviewable on appeal from final judgment." 844 F.2d at 55. Distinguishing Abney, Mitchell, and Helstoski, the court found Lauro Lines' right to face trial only before the chosen tribunal in the agreed forum was not of the same magnitude as a Constitutional "right to be free from double jeopardy . . . or the right to be free of any trial whatever . . ." The Chasser court concluded Lauro Lines' "right to secure adjudication in a particular forum is not lost simply because enforcement is post-

poned," and, in view of this, the court further concluded it "need not decide whether the first two Cohen requirements are met." 844 F.2d at 55.

The rights in Abney (double jeopardy), Mitchell (qualified governmental immunity), and Helstoski (Speech or Debate immunity) are important, but for the purpose of immediate appellate review there is no requirement that the "small class" of Cohen orders be restricted to those raising issues of Constitutional magnitude. Cohen involved an order denying security, Swift an order vacating an attachment, Moses H. Cone an order staying a federal action pending resolution of the same issue of arbitrability by a state court; yet all qualified for immediate appellate review as collaterally final orders.

As recently stated by the Fourth Circuit, on the denial of enforcement of a forum clause, the first and second prongs of the Cohen test "are easily met":

> The district court's order conclusively determined the disputed question of transfer and, in so doing, resolved an important issue completely separate from the merits of the action.

Sterling Forest Associates v. Barnett Range Corp., 840 F.2d 249, 253 (4th Cir. 1988).

Addressing the third prong of the Cohen test, the Eighth Circuit in Farmlands Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986), explained:

> After a final determination is made on the merits it will be too late effectively to review the present order because the contractual right to trial in Illinois will have been lost. Granted, defendants could raise the issue after a final

> determination on the merits and possibly gain a new trial in Illinois. However, a Missouri trial and appeal is not what was contemplated by the parties when they signed the contract; what was contemplated is single trial resolution of disputes in Illinois. Denying defendant's immediate appeal of this issue will effectively deprive them of a contractual right.

806 F.2d at 851; see also Sterling Forest Associates, Ltd. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988); Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 196-97 (3rd Cir. 1983).

The Chasser court lost sight of the fact the Forum Clause not only provided Lauro Lines a right to trial before a tribunal in Italy, it also provided Lauro Lines a right to be free from suit anywhere else.

Erroneous orders denying enforcement of a forum clause strip a civil litigant of its contracted for right not to be

haled for trial before tribunals outside the agreed forum. Following trial, it is too late to restore that right, even if the party denied enforcement ultimately prevails. If that party loses, its only solace would be a dubious chance to gain a reversal on appeal, which, if successful, would mean a second trial, this time in the correct forum. But a trial outside the agreed forum, and a possible appeal followed by yet another trial, is not what a forum clause contemplates. Such a clause contemplates a single trial, in the agreed forum, before the chosen tribunal. An order denying enforcement of a forum clause simply cannot be effectively reviewed after trial on the merits. As succinctly put in Sterling: "[T]he time to do it is now." 840 F.2d at 253.

E. Immediate Appellate Review is in Keeping with the Strong Federal Policy Favoring Enforcement of Forum Clauses

It was pointed out in Bremen:

> Forum selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were "contrary to public policy", or that their effect was to "oust the jurisdiction of the court." Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view . . . is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty . . . This approach is substantially that followed in other common-law countries, including England. It is the view advanced by noted scholars and that adopted by the Restatement of Conflict of Laws. It accords with ancient concepts of freedom of contract and reflects an appreci-

> ation of the expanding horizons of American contractors who seek business in all parts of the world ...

407 U.S. at 9-11.

In Stewart Organization v. Ricoh Corp., 487 U.S. _____, 108 S.Ct. 2239, 101 L.Ed.2d 22, 33-34 (1988), in a concurring opinion joined in by Justice O'Connor, Justice Kennedy observed: "enforcement of valid forum selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system . . . . Courts should announce and encourage rules that support private parties who negotiate such clauses . . . ."

Surely, the essential concomitant of this strong federal policy encouraging private parties to make use of forum clauses is the right of immediate

appellate review of district court orders denying their enforcement. See, e.g. Sterling Forest Associates, Ltd. v. Barnett-Range Corp., 840 F.2d 249, 252 (4th Cir. 1988) ("We think evidence of a continuing hostility to forum selection clauses is apparent not only in the district court's egregious misinterpretation of the clause at issue herein, but also in the manner in which the district court's holding was arrived at.").

CONCLUSION

The Order of the United States Court of Appeals for the Second Circuit dismissing for want of appellate jurisdiction the appeal of Lauro Lines from an Order of the United Stated District Court for the Southern District of New York denying enforcement of a foreign foreign selection

clause should be reversed, and the matter should be remanded to the United States Court of Appeals for the Second Circuit for the determination of Lauro Lines' appeal.

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Respectfully submitted,

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